

90-902

Supreme Court, U.S.
FILED

NOV 20 1990

JOSEPH F. SPANIOLO, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT O LAMPL, PETITIONER,

VS.

FOUR D MANUFACTURING COMPANY AND
SUPERIOR PLASTICS, INC.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT AND APPENDICES

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Questions Presented.

QUESTIONS PRESENTED

1. Whether the federal courts are precluded by 11 U.S.C. §327(a) from approving a professional's application for employment nunc pro tunc in a chapter 11 bankruptcy proceeding.

2. Whether the federal courts, in reviewing a professional's application for approval for employment nunc pro tunc, must require a finding of "extraordinary circumstances" or is appointment nunc pro tunc allowed based upon a standard amounting to oversight and/or excusable neglect.

3. What is the appropriate test that the federal courts must utilize in applying the standard that would allow the appointment of a professional nunc pro tunc.

4. Whether appointment nunc pro tunc of an attorney for a debtor-in-possession should be disapproved where: the court and creditors knew that he was representing the estate, a plan of reorganization was confirmed through his efforts, all parties-in-interest approved his representation and fees through casting votes of acceptance to the plan of reorganization where said confirmed plan made provisions for his attorney's fees, the attorney benefited the estate and there was consent by all parties-in-interest to the attorney's appointment nunc pro tunc and no objection to his fee application.

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Jurisdiction.

Robert O Lampl (Lampl) respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 22, 1990, in which the Court affirmed the District Court's Order affirming the Bankruptcy Court's Order denying Petitioner's Motion To Approve Counsel For The Debtor Nunc Pro Tunc and Application For Compensation.

OPINIONS BELOW

The opinion of the Bankruptcy Court for the Western District Of Pennsylvania, entered September 1, 1989, is unreported (Appendix "B," *infra*, pp. 9a-21a). The opinion of the District Court for the Western District of Pennsylvania, entered February 6, 1990, is also unreported

(Appendix "A," *infra*, pp. 1a-8a). The United States Court of Appeals for the Third Circuit did not render an opinion, but rather, entered a Judgment Order affirming the judgment of the District Court (Appendix "C," *infra*, pp. 22a-23a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is §327(a) of the Bankruptcy Code, 11 U.S.C. §327(a). It is reprinted in Appendix "E," *infra*, p. 25a-27a.

STATEMENT OF THE CASE

I. Procedural History

On March 5, 1984, Respondents, Superior Plastics, Inc. and Four D Manufacturing Company ("Debtors") filed chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Western District of Pennsylvania. The Debtors' counsel was the Petitioner, Lampl, who began representation of both Debtors in February, 1984.

On January 24, 1989, Lampl filed an Application for Compensation, seeking the amount of \$21,975. Thereafter, on April 3, 1989, Lampl filed a Motion to Approve Counsel for the Debtor Nunc Pro Tunc. This was consented to both by the Trustee and the attorney for the Creditors' Committee.

On September 1, 1989, the Bankruptcy Court denied both the motion and the application submitted by Lampl.

On September 5, 1989, the Bankruptcy Court confirmed the Debtors' plan of reorganization which had been submitted by Lampl.

Lampl filed a timely appeal from the Bankruptcy Court's denial of his Motion to Approve Counsel for the Debtor Nunc Pro Tunc and the denial of his Application for Compensation. The District Court, on February 6, 1990, issued a Memorandum Opinion and Order, affirming the Order of the Bankruptcy Court. Lampl thereafter timely appealed to the United States Court of Appeals for the Third Circuit which entered an Order on August 22, 1990,

affirming the District Court judgment. This petition for writ of certiorari followed.

II. Factual Background

In October of 1979, Superior Plastics, Inc. purchased 100% of the stock of Four D Manufacturing Company. Superior Plastics owned no real property or equipment. Its assets were the assets of Four D Manufacturing, which consisted of real property of three buildings on approximately 14 acres of land in Glenville, West Virginia. The personal property included various product lines for manufacturing of plastic piping and machine shop equipment.

Due to economic distress in the local area and several business interruptions

because of flooding, Superior Plastics, Inc. and Four D Manufacturing were unable to meet their obligations and commenced chapter 11 bankruptcy filings in the United States Bankruptcy Court for the Western District of Pennsylvania at Case Nos. 84-474 and 84-473 on March 5, 1984.

From the point of the bankruptcy filings onward, Lampl, who had begun to represent the Debtors in February of 1984, was listed on the appropriate docket sheets as the attorney for the Debtors and represented the Debtors through numerous bankruptcy proceedings, as detailed in the docket sheets, up to and including a plan of reorganization which was confirmed by the Bankruptcy Court on September 5, 1989.

Throughout the proceedings, there was

full disclosure to the creditors of Lampl's participation in the bankruptcy proceedings, including the plan confirmation process. The creditors accepted Debtors' plan of reorganization based upon a disclosure statement which accounted for Lampl's fees.

On January 24, 1989, Lampl filed an Application for Compensation seeking the amount of \$21,975. Thereafter, on April 3, 1989, Lampl moved the bankruptcy court for nunc pro tunc approval as counsel for the Debtors, asserting the following reasons:

- a) Lampl's services greatly benefited the Estate;
- b) All parties-in-interest were aware that Lampl was Debtors' counsel and approved the general amount of his fees which were listed

in the plan of reorganization;

c) Lampl believed that all appropriate motions had been filed. Failing to get approval in 1984 was not Lampl's fault because he could not have foreseen the future parameters and impact of obtaining court approval, as it was not the practice of that time; and,

d) The Court knew he was Debtors' counsel and saw how he had benefited the case.

On September 1, 1989, by Memorandum Opinion and Order, the United States Bankruptcy Court for the Western District of Pennsylvania denied Lampl's application to Approve Counsel for the Debtor Nunc Pro Tunc and his Application for Compensation. Following the decisions

of the Third Circuit in In re Arkansas, 798 F.2d 645 (3d Cir. 1986) and F/S Airlease II, Inc. v. Simon, 844 F.2d 99 (3d Cir. 1988), the Bankruptcy Court held that only in "extraordinary circumstances" may the Court approve employment nunc pro tunc, and, in the instant case, the Bankruptcy Court felt that "extraordinary circumstances" were absent. The Court so held, despite the fact that it was aware that Lampl was representing the Debtors and Debtors' Plan of Reorganization, which accounted for his fees, was confirmed through his efforts. In addition, throughout the proceedings, there was no objection by the Trustee or counsel for the Creditors' Committee to Lampl's motion for approval of employment nunc pro tunc or to his application for fees. Further,

neither the Trustee nor counsel for the Creditors' Committee have opposed Lampl's appeals.

REASONS FOR GRANTING THE WRIT

A. The Federal Court of Appeals for the Third Circuit has decided an important question of federal law which this Court should settle, relative to whether and under what circumstances a professional for a debtor-in-possession in a chapter 11 bankruptcy case may receive nunc pro tunc appointment.

The questions presented in this petition for writ of certiorari deal with a professional's request of the bankruptcy court for appointment in a chapter 11 bankruptcy proceeding nunc pro tunc. The

applicable statutory provision involved is 11 U.S.C. §327(a).

From a straight-forward reading of the statute, it would appear that a debtor/debtor-in-possession is not authorized to employ an attorney or any other professional unless bankruptcy court approval has first been obtained. See In re Glinz, 36 B.R. 17 (Bkrtcy. D.N.D. 1983). In addition, the federal courts have uniformly held that a professional, including an attorney, cannot receive compensation where no order has been entered authorizing employment. Albers v. Dickinson, 127 F.2d 957 (8th Cir. 1947); Matter of Mansfield Tire and Rubber Company, 65 B.R. 446, 465 (Bkrtcy. N.D. Ohio 1986); In re Mork, 19 B.R. 947 (Bktrcy. D. Minn. 1982). However, in a number of cases,

it has happened that, for whatever the reason, prior approval has not been obtained by the professional, and, accordingly, retroactive appointment of the professional has been sought in the bankruptcy court. The question then becomes, whether 11 U.S.C. §327(a), by its express terms or implication, also prohibits the granting of nunc pro tunc approval after the attorney or other professional has already provided services. Obviously, to the professional involved, whether it be an attorney or some other professional, this is an important question as the professional will want to be paid for his services, particularly in those cases where the services have benefited the bankruptcy estate. Professionals are obviously needed in a chapter 11 proceeding,

whether it be an attorney, accountant, real estate agent, or some other professional, and the failure to allow nunc pro tunc appointment can often lead to harsh results.

Some courts, in deciding the issue, have taken a rather inflexible, "per se" approach which would exclude any nunc pro tunc approval of employment of any professional, regardless of the time or effort of the professional or attorney or the circumstances of the particular case. See In re Eureka Upholstering Company, 48 F.2d 95 (2nd Cir. 1931); In re Futuronic Corp., 655 F.2d 463 (2d Cir. 1981), cert. denied, 455 U.S. 941 (1982); Matter of Arlan's Department Stores, Inc., 615 F.2d 925 (2nd Cir. 1979); In re Rene Press, Inc., 23 B.R. 381 (Bkrtcy.

D. Mass. 1982); In re Johnson, 21 B.R. 217 (Bkrtcy. D.C. 1982); In re Thibodeau, 20 B.R. 107 (Bkrtcy. D. Maine 1982); In re Mork, supra.

On the other hand, some courts have taken a more liberal view and have allowed nunc pro tunc appointment of a professional. See Stolkin v. Nachman, 472 F.2d 222 (7th Cir. 1973); Matter of Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir. 1983); In re King Electric Company, 19 B.R. 660 (Bkrtcy. E.D. Va. 1982). These courts tend to take a more flexible approach to the matter and consideration is given to nunc pro tunc approval. This is particularly so where its refusal would be inequitable and unfair under the circumstances and the consequences to the attorney or professional, who had quite

probably labored honestly and diligently for the benefit of the estate and who, by a mere, unintended oversight neglected to apply for approval, would be particularly harsh. In re Glinz, supra. at 19.

The courts that have followed a more flexible approach have relied on the Supreme Court's decision in Bank of Marin v. England, 385 U.S. 99 (1966), wherein the Supreme Court recognized the over-riding consideration that equitable principals govern the exercise of bankruptcy jurisdiction. This view is the view which should be adopted in these situations as the bankruptcy courts are, as recognized by the Supreme Court, courts of equity. In fact, a literal compliance with the statute has the potential to produce and

has, in fact, led to unfair hardship for some professionals who have not sought and obtained pre-employment approval, particularly where the court, because of the statute, has had to deny a professional compensation where this professional has labored and performed valuable services to the bankruptcy estate.

However, the questions concerning nunc pro tunc approval are not resolved merely by deciding the initial issue as to whether the statute allows for nunc pro tunc approval. This is so because, if the Court should decide that the statute within its parameters allows for nunc pro tunc approval, then the questions become: under what standard, e.g. "extraordinary circumstances" or "excusable neglect," etc., should nunc pro tunc approval be

granted and what test or tests should be applied to determine whether the standard has been met.

Further need for the Supreme Court to step in and decide this matter is necessary as a number of the federal courts, have taken a position whereby, on the one hand, they have advocated a more liberal approach, and they have indicated that in certain circumstances, nunc pro tunc approval may be granted, but on the other hand, they have adopted a standard so difficult and inequitable that it becomes virtually impossible to comply with the standard.

An example is the decisions of the Third Circuit Court of Appeals in In re Arkansas Company, Inc., 798 F.2d 645 (3rd Cir. 1986), and in F/S Airlease, II, Inc. v. Simon, 844 F.2d 99 (3rd Cir. 1988).

These decisions hold that the bankruptcy courts do have equitable power to authorize retroactive employment of counsel and other professionals. However, the standard to be applied in granting nunc pro tunc approval is that of "extraordinary circumstances." In so making such a determination, the court, as a preliminary matter, must determine:

1. Whether the court would have granted prior approval in light of the statutory requirements; and,
2. Whether the services performed were necessary under the circumstances. Arkansas, Supra at 650.

After these considerations, the bankruptcy court must then determine whether there

are "extraordinary circumstances" which support the exercise of equitable discretion to make a nunc pro tunc appointment. Id; Matter of J.D. Lynam No. 2, Inc., 72 B.R. 411 (W.D. Pa. 1987).

In making this determination, the Court has enumerated a number of tests. However, these tests have been narrowed down to a determination of whether there was any "hardship" beyond the professional's control which prevented the professional from seeking prior approval. In other words, the law in the Third Circuit has now become very clear: The lack of prior approval must be the result of extraordinary circumstances - hardship beyond the professional's control. In re Hospitality Ltd., 86 B.R., 59, 65 (Bkrtcy. W.D. Pa. 1988). The result is the application of

a test and a standard that not only can lead to an extraordinary inequitable and harsh result, particularly where the professional may have labored honestly and diligently for the benefit of the estate and, by a mere unintended oversight, neglected to apply for pre-employment approval, but also, in effect, denies the nunc pro tunc approval which the circuit holds is allowable under the statute as the test and standard simply cannot be met.

An example of the foregoing is the case herein. The Third Circuit's definition of "extraordinary circumstances" precludes consideration of the equitable circumstances in this case. It prohibits consideration of the fact that at the time these cases were filed for chapter 11 reorganization,

Arkansas had not yet been decided, and the practice in the Bankruptcy Court in the Western District of Pennsylvania at that time was not to insist upon "prior" approval of a debtor's attorney. Beyond that, this particular Petitioner appeared many times in front of the Bankruptcy Court representing the Debtors on numerous occasions and, in fact, had a confirmed plan obtained through the Bankruptcy Court. This confirmed plan notified all the creditors, if they had not been notified before, that Lampl was acting on behalf of the Debtor and that there were attorney's fees involved. The plan was accepted on this basis and confirmed with these provisions. There was no objection to the applications for approval nunc pro tunc and for counsel fees. In fact these

were submitted to the Bankruptcy Court, with the consent of counsel for the Committee for Unsecured Creditors and the Trustee. This is not a case of an officious intermeddler or gratuitous volunteer which the statute may have been designed to protect against. Nevertheless, under the standard and tests adopted by the Third Circuit, Lampl's applications were denied, as the foregoing factors were not considered "extraordinary circumstances."

A familiar principal of equity is that services that were properly furnished "for the common benefit of those interested in the fund, should be paid from the fund," and that "an expense which it [the court] has permitted for the common benefit..., in equity and good conscience, should be satisfied" before the claims of pre-existing

creditors are satisfied. New York Dock Company v. Poznan, 274 U.S. 117 (1927). Accordingly, a bankruptcy judge, in the exercise of sound discretion and as a court of equity administering equitable principals, should not be precluded from entering an order nunc pro tunc authorizing the employment of attorney or other professional for the debtor-in-possession where the attorney or professional (who should have secured prior approval for their retainer and services) has performed valuable services for the debtor's estate. See Matter of Triangle Chemicals, supra. It would be unjust, under such circumstances, to deny compensation for the services rendered. See In re Tom's Variety and Hardware, Inc., 30 B.R. 298 (Bkrtcy. S.D. Ohio, W.D. 1983).

As indicated, the Third Circuit has so narrowly defined the term "extraordinary circumstance" so as to effectively preclude equitable relief under such circumstances as are presented in this Case. In addition and as a corollary, Arkansas explicitly precludes mere oversight and/or excusable neglect as the standard upon which nunc pro tunc appointment may be granted. On equitable principles, and on the power of the bankruptcy court to review a professional's fee application, excusable neglect of a professional who is in a position to file a timely application can and should either be recognized as "extraordinary circumstances," or be considered as a standard in and of itself under which nunc pro tunc approval can be granted.

Historically, the reasons cited for the application of the "inflexable per se rule" disallowing nunc pro tunc approval of employment include the need to assess, at the beginning of a case, the necessity for the employment, In re Robertson, 4 F.2d 248 (3rd Cir. 1925); to ascertain "the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same," In re Hydrocarbon Chemicals, 411 F.2d 203, 205 (3rd Cir. 1969); to prevent the payment of compensation to "an officious intermeddler or gratuitous volunteer," 2 Collier on Bankruptcy, §327.02 at 327-6, and, most significantly and generally, to maintain strict control of the assets of the bankruptcy estate.

Arkansas, *supra*. See also Matter of Whitemere Development Corp., 65 B.R. 734 (Bkrtcy. D.N.J. 1986).

Clearly, prior approval of professional employment on behalf of a debtor-in-possession is desirable to maintain court supervision and control of the estate. The rule should continue to be effected, and negative consequences should attach to violations of the rule, including the possibility of monetary sanctions against any allowance which may subsequently be allowed. However, the element of control may be satisfied fully upon the complete and thorough review of an application for allowance made by an applicant who receives nunc pro tunc approval of his employment. The automatic consequences of a denial of compensation regardless of services

actually rendered and benefit bestowed upon the estate for the negligent failure to comply with the requirement of obtaining court approval is not justified in every instance and is abnormally harsh, oppressive and inequitable.

With regard to the need for the court to ascertain the necessity for services rendered, it is clear that as a matter of course, nearly all debtors-in-possession and trustees have the benefit of legal representation. The necessity for legal services is rarely, if ever, questioned or challenged. As well, the customary authorization for employment on a general retainer rather than for specific services is never challenged. If the necessity for specific services rendered to the estate is questioned, it

may be determined when the application for compensation is reviewed.

It is also clear that a debtor-in-possession is generally free to select his own attorney and that the selection will be honored by the court if it is demonstrated that there is no adverse interest in the estate and that the applicant is a disinterested person. Such proposed orders are routinely signed in the bankruptcy court upon proper certification of the two requested elements. The court's need to assess counsel's level of expertise, integrity and competence, as suggested by the Hydrocarbon Court, does not actually arise until the fee application is reviewed. At the initial application stage for court approval of employment, a bankruptcy court's rejection

of the application on the basis that the attorney does not have the proper level of expertise, integrity or competence to represent the debtor-in-possession would be highly questionable. As a corollary, the suggestion of Arkansas that it would be difficult for the bankruptcy court to decide, after the fact, whether the two elements of no adverse interest and disinterested person status have been met is questionable, Matter of Whitemere Development Corp., supra. at 738.

Support for a more flexible approach to allow mere oversight and/or excusable neglect as a standard under which nunc pro tunc approval may be granted may be found in the Fifth Circuit decision of Triangle Chemicals, supra. Specifically, the Triangle Chemicals Court held that

where, through oversight, the attorney has neglected to obtain prior approval, but has continued to perform services for the debtor-in-possession, "the Bankruptcy Court retains equitable power in the exercise of its sound discretion, under exceptional circumstances, to grant such approval nunc pro tunc, upon proper showing..." Id. at 1289.

It is important to address the reference in the Triangle Chemicals case to the need to establish "exceptional circumstances." The reference appears to be tempered by close review of the case. The facts of the case reflect simple negligence on the part of the attorney in failing to file an appropriate application, that the attorney was otherwise qualified to serve, and that the services rendered by the

attorney benefited the estate. Additionally, the Triangle Chemicals Court expressly relied on the reasoning of In re King Electric Company, 19 B.R. 660 (Bkrtcy. E.D. Va. 1982), wherein a bankruptcy court's determination to deny nunc pro tunc approval of the employment of an attorney where the attorney was negligent in failing to obtain prior court approval for his employment was reversed on the grounds that no reason had been advanced "for withholding equity... other than the application was not timely. Additionally, because the Bankruptcy Court has full control over the allowance of fees, there is here no chance of overreaching through unnecessary or improper activity of counsel, either before or after formal employment." Id, at 663.

In summary, while the requirement of prior court approval should be maintained, the need for strict control of the administration of the bankruptcy estate may be satisfied by consideration of relevant factors upon a nunc pro tunc application and careful scrutiny of fee application. Among the factors that could be considered are the following:

1. Whether the necessary elements of 11 U.S.C. §327, including no adverse interest and disinterested person status have been met;
2. Whether the services rendered were necessary;
3. Whether the applicant could be considered to be an intermeddler or volunteer;

4. Whether the applicant was recognized by the bankruptcy court and others involved in the case as a legal representative of the debtor-in-possession or trustee;
5. Whether any prejudice to others involved in the case is demonstrated; and,
6. Whether the services rendered by the applicant benefited the estate.

See Matter of Whitemere Development, supra.

Mere inadvertence and excusable neglect should be allowed to constitute a basis for granting nunc pro tunc approval within the court's discretion. See also Matter of Vlachos, 61 B.R. 473 (Bkrctcy. S.D. Ohio 1986). The Supreme Court has recognized the "overriding consideration that equitable

principals govern the exercise of bankruptcy jurisdiction." Bank of Marin, supra. Additionally, because the bankruptcy court has full control over the allowance of fees, there is no chance of overreaching through an unnecessary and improper activity of counsel either before or after final employment. See King Electric Company, supra at 663. A more flexible approach is the preferable approach in light of the principals of equity. Consideration must be given to the entry of a nunc pro tunc order of appointment where mere negligence or neglect is involved, particularly where its refusal would be inequitable and unfair in its consequences to a professional who quite probably has labored honestly and diligently for the benefit of the Estate and who,

by mere oversight, neglected to apply for pre-employment approval. Such modification of the Third Circuit's decision would be more in keeping with equitable principals which are a prime characteristic of a bankruptcy court. See In re Glinz, *supra*.

B. The decisions of the Third Circuit Court of Appeals are in direct conflict with decisions of other Federal Courts of Appeal on whether "extraordinary circumstances" or simple oversight and/or neglect must be shown by a professional seeking "nunc pro tunc" appointment and the tests to be applied in determining whether these standards have been met.

The Third Circuit has taken a very restrictive approach in granting nunc pro tunc approval for appointment of a professional on behalf of a debtor-in-possession in a chapter 11 bankruptcy case. Although recognizing that equity does allow nunc pro tunc approval under 11 U.S.C. §327(a), the Third Circuit has narrowly restricted the application of nunc pro tunc approval to a standard of "extraordinary circumstances" which, by definition, does not allow for neglect and/or mere oversight of an attorney or other professional in seeking prior approval. This is contrary to: Matter of Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir. 1983). In addition, it is contrary to: In re King Electric Company, 19 B.R. 660 (Bkrtcy.

E.D. Va. 1982); In re Glinz, supra; Matter of Vlachos, supra; In re Crest Mirror and Door Company, Inc., 57 B.R. 830 (Bkrtcy. 9th Cir. 1986); In re Freehold Music Center, Inc., 49 B.R. 293 (Bkrtcy. D. N.J. 1985); In re Twinton Properties Partnership, 27 B.R. 817 (Bkrtcy. M.D. Tenn. 1983).

Further, beyond whatever standard is utilized, there are a number of conflicting tests which have been applied within the Circuits to determine whether a standard has been met so that nunc pro tunc approval may be granted. For example, the Third Circuit requires that the lack of prior approval must be the result of extraordinary circumstances, i.e., hardship beyond the professional's control. In re Hospitality, Ltd., supra at 65. However, the Ninth

Circuit, which also requires that nunc pro tunc approval be limited to exceptional circumstances, requires that an applicant show both a satisfactory explanation for failure to receive prior judicial approval and that he or she has benefited the bankruptcy estate in some significant matter. In re THC Financial Corp., 837 F.2d 389, 392 (9th Cir. 1988). In addition, some courts have focused on a nine-part test, In re Twinton Properties Partnership, supra at 819-820. Other Courts have focused on the benefit conferred on the Estate by the professional's activities. See In re Rich Joyce Enterprises, Inc., 76 B.R. 42, 44 (Bkrtcy. E.D. N.Y. 1987); In re Tom's Variety and Hardware, Inc., 30 B.R. 298, 299 (Bkrtcy. S.D. Ohio 1983); In re Tinsley and Groom, 49 B.R. 94, 96 (Bkrtcy. W.D. Ken. 1985).

If nunc pro tunc approval is to be granted, it should be allowed under a standard which would include simple oversight and/or neglect on behalf of the attorney and/or the professional. As the bankruptcy court has full control over the allowance of fees, there is no chance here of overreaching through unnecessary or improper activity of either counsel or some other professional either before or after employment. Further, the test that should be utilized to satisfy the requirements of the statute should be one comparable to the one suggested in Whitemere Development.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE:

FOUR D MANUFACTURING
AND SUPERIOR PLASTICS,
INC.,

Civil Action
No. 89-2258

Debtors.

MEMORANDUM AND ORDER

Barron P. McCune, Senior District Judge
February 6, 1990

We consider an appeal from a final order of the United States Bankruptcy Court dated September 1, 1989, which denied an application to approve counsel for the debtor nun (sic) pro tunc and denied the application for compensation for his services. For the following reasons the order of the bankruptcy court will be affirmed.

Statement of Facts

In October of 1979, Superior Plastics, Inc. purchased 100% of the stock of Four D Manufacturing Company (collectively the "debtor"). Superior Plastics owned no property or equipment, thus, its assets became those of Four D, which included 3 buildings on approximately 14 acres of land in Glenville, West Virginia, and some manufacturing and machine shop equipment.

On March 5, 1984, Superior Plastics and Four D filed a Chapter 11 petition in bankruptcy. Debtor's counsel, Robert O. (sic) Lampl ("Lampl" or "Appellant") began representation of the debtor in February 1984. However, approval by the bankruptcy court for the retention of Lampl to represent the debtor was not obtained

during his representation. Lampl had overlooked filing of appropriate motions to seek court approval of his retention.

On April 3, 1989, Lampl moved for nunc pro tunc approval, asserting that the bankruptcy court and all parties in interest knew that he was debtor's counsel, all interested parties had approved the amount of his fees, and he had erroneously (sic) believed that all appropriate motions had been filed to approve his retention.

On September 1, 1989, the bankruptcy court denied Lampl's application for approval nunc pro tunc and application for counsel fees. The bankruptcy court held that only in "extraordinary circumstances" may the court approve employment nunc pro tunc, and in the instant case "extraordinary circumstances" were absent.

There has been no objection by the Trustee or counsel for the creditor's committee to Lampl's application nunc pro tunc and for approval of fees.

Discussion

Our review of the bankruptcy court's conclusions of law are plenary, and we employ the "clearly erroneous" standard in review of the court's factual findings. PA Record Outlet, Inc. v. Mellon Bank, No. 89-3466, Slip op. at 4 (3d. Cir. January 26, 1990).

Nunc pro tunc approval should be limited to cases where extraordinary circumstances exist. In re Arkansas, 798 F.2d 644, 649 (3d Cir. 1986). Inadvertance (sic) or oversight of counsel does not constitute excusable neglect sufficient to relieve the parties of the consequences of their

inaction. Id. Retroactive approval of counsel is limited to cases where prior approval would have been appropriate and delay in seeking approval was due to hardship beyond counsel's control. Id. at 650.

Appellant argues that "extraordinary circumstances" are present because he appeared in bankruptcy court on numerous occasions to represent the debtor, and had a plan confirmed through the bankruptcy court which notified all creditors that appellant was acting on behalf of the debtor and that he expected to be paid for his representation. Furthermore, appellant argues that because there was no objection to his application for approval nunc pro tunc or his application for counsel fees, and that his services were beneficial to

the estate, extraordinary circumstances existed such that the bankruptcy court erred in denying his application.

The Third Circuit Court of Appeals, in In re Arkansas, supra made it clear that a bankruptcy court, in its discretion, may grant retroactive approval of appointment of a professional, but that it should grant such approval only under "extraordinary circumstances." Id. at 650. Such circumstances do not include the neglect of a professional who was in a position to timely file an application for approval.

Here, appellant, commenced representation of the debtor from the onset of the Chapter 11 filing until the plan for reorganization was confirmed by the bankruptcy court. He is a veteran of

bankruptcy practice in this district and through his neglect and inadvertance (sic) failed to secure appointment as debtor's counsel when he was in a position to file an application for approval at any time.

We agree with the bankruptcy court that the application of In re Arkansas requires a harsh result. However, it is the law in this circuit and its reading is very clear.

The order of the bankruptcy court is affirmed.

An order follows.

/s/ BARRON P. McCUNE

SENIOR UNITED STATES
DISTRICT JUDGE

cc: Counsel of record.

8a

Appendix A.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

FOUR D MANUFACTURING
COMPANY AND SUPERIOR
PLASTICS, INC.,
Debtors.

Civil Action
No. 89-2258

ORDER

AND NOW, February 7, 1990, the order of the bankruptcy court dated September 1, 1989, which denied appellant's application for approval as counsel for the debtor nunc pro tunc and also denied his application for compensation, is affirmed.

/s/ BARRON P. McCUNE
SENIOR UNITED STATES
DISTRICT JUDGE

cc: Robert O Lampl, Esq.
Ninth Street & Liberty Ave.
Pittsburgh, Pa. 15222

Joseph J. Bernstein, Esq.
1133 Penn Avenue
Pittsburgh, Pa. 15222

David Rudov, Esq.
12th Floor, Lawyers Building
Pittsburgh, Pa. 15219

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: *

FOUR D MANUFACTURING
COMPANY AND SUPERIOR
PLASTICS, INC.,
Debtors.Bankruptcy No.
84-473
Motion No.
89-2188MMEMORANDUM OPINION

The matter presently before the court is an Application for Compensation of the Debtor's Counsel, Robert O Lampl ("Lampl"), and a Motion to Approve Counsel for the Debtor Nunc Pro Tunc. The motion for nunc pro tunc approval is denied. Therefore, the application for compensation is also denied. In support of our decision, the court now renders the following findings of fact, conclusions of law, opinion, and order of court.

I. FINDINGS OF FACT

1. The debtors filed for relief under Chapter 11 of the Bankruptcy Code on March 5, 1984.

2. Lampl began to represent the debtors in February of 1984.

3. Lampl filed an application for compensation on January 24, 1989.

4. Lampl seeks fees in the amount of \$21,975.

5. Lampl asserts that he believed that appropriate motions to approve his retention had been filed.

6. Therefore, Lampl did not seek further approval or appointment of this court.

7. On April 3, 1989, Lampl moved for nunc pro tunc approval, asserting the following reasons:

- (a) His services have greatly benefitted (sic) the estate;
- (b) All parties in interest were aware that he was debtor's counsel and approved the general amount of his fees which were listed in the plan of reorganization;
- (c) He believed that all appropriate motions had been filed. Failing to get approval in 1984 was not the movant's fault because he "could not have foreseen the future parameters and impact of obtaining court approval, as it was not the practice of the time;" and,
- (d) The court knew he was debtor's counsel and saw how he benefitted (sic) the case.

8. Notwithstanding the preceding paragraph, Lampl has not presented a

compelling reason for failure to timely seek court approval of his retention.

9. Lampl was not under time pressure to begin representation without approval.

II. CONCLUSIONS OF LAW

1. Section 327(a) of the Bankruptcy Code, 11 U.S.C. §327(a) empowers the trustee or debtor in possession to hire attorneys and other professionals.

2. Such professionals must obtain prospective approval of their retention.

3. Appearances in court and signing documents filed with the court do not constitute application to hire professionals or implicit approval by the court of retention of such professionals.

4. Verbal references by the court indicating that Lampl was counsel for the debtor did not constitute implicit (or

explicit) approval by the court of the retention of Lampl.

5. The retention of Lampl was never approved by this court.

6. Had Lampl sought prior approval of his retention, the court would have granted prior approval in light of statutory requirements.

7. In extraordinary circumstances, bankruptcy courts have discretion to grant nunc pro tunc approval of the employment of professionals.

8. Such extraordinary circumstances are absent in the instant case.

III. ANALYSIS

11 U.S.C. §327(a) provides that "the trustee, with the court's approval, may employ one or more attorneys, accountants...or other professional

persons." (Emphasis added.) Employment of professionals must be approved when they commence their services and before the time they seek compensation. In "extraordinary circumstances," the court may approve employment nunc pro tunc. In re Arkansas, 798 F.2d 645, 649 (3d Cir. 1986); see also F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.), 855 F.3d 99 (3d Cir. 1988).

In In re Arkansas, counsel for the committee of unsecured creditors inadvertently failed to obtain court counsel approval of its retention. Thirteen months into the Case, counsel sought nunc pro tunc approval of its retention. The district court affirmed the bankruptcy court's denial of nunc pro tunc appointment. The district court observed that bankruptcy

courts may grant nunc pro tunc approval, but only in "cases in which the party seeking approval shows that it would be otherwise subject to an extraordinary hardship not of its own making." In re Arkansas, 55 Bankr. 384, 386 (Bankr. N.J. 1985).

The court of appeals affirmed the district court. It directed that a bankruptcy court reviewing nunc pro tunc appointment consider the following factors:

Whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned the initial approval had not been granted, the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

In re Arkansas, 798 F.2d at 650.

Lampl asserts that he filed appropriate motions to have the court approve his

retention, but such motions are not of record. Therefore, we must conclude, as was the case in In re Arkansas above, that counsel simply failed to obtain the requisite approval. As the Third Circuit has stated, the "mere neglect of the professional who was in a position to file a timely application" does not constitute the "extraordinary circumstances" that allow a nunc pro tunc appointment. Id.

Lampl next argues that his activities on behalf of the debtor and the numerous references to him in correspondence and court documents justify nunc pro tunc approval. However, those same factors did not constitute "extraordinary circumstances" in In re Arkansas.

Lampl also argues that he should receive nunc pro tunc approval because his services benefitted (sic) the case. Although his services may have been beneficial to the estate, salutary effects do not constitute "extraordinary circumstance."

Moreover, it was the responsibility of Lampl to see that his employment was approved by the court. Otherwise, this court would have the onerous burden of reviewing the docket to ensure that counsel had been approved before addressing such counsel. It is not the representation that is in dispute; it is the estate's obligation to pay that implicates approval. The result urged upon us by Lampl contradicts In re Arkansas.

Lampl also asserts that he "could not have foreseen the future parameters and

impact of obtaining court approval, as it was not the practice of that time..." It is disputed that the practice was not to obtain approval. The practice of Lampl obtaining court approval is not the standard the court must apply. The standard has become In re Arkansas.

The application of In re Arkansas results in a harsh result in this case, as it has in many other cases. Pending fee applications are subject to In re Arkansas; that decision is not only prospective. Lampl is an experienced bankruptcy practitioner who should have been aware of the need to obtain court approval.

Lampl also asserts that In re Arkansas only applies to situations where "abuses of the system" are present. In re Arkansas cannot be read that narrowly.

This court would have granted prior approval in light of statutory requirements..." In re J.D. Lynan No. 2, Inc., d/b/a Mr. Steak (#406), No. 87-188, slip op. at 6 (W.D. Pa. April 14, 1987). Because we conclude extraordinary circumstances preventing nunc pro tunc appointment were absent, we need not address the issue of "whether the services performed were necessary under the circumstances." Id.

For the reasons stated above, the Motion to Approve Counsel for the Debtor Nunc Pro Tunc is denied. Consequently, the Application for Compensation of the Debtor's Counsel is also denied.

An appropriate order is attached.

Dated this 1 day of September 1989
at Pittsburgh, Pennsylvania

/S/ JOSEPH L. COSETTI
Bankruptcy Judge

cc: Robert O Lamp¹, Esq.
The Renshaw Building
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Pittsburgh, PA 15222

Joseph L. Bernstein, Esq.
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

FOUR D MANUFACTURING
COMPANY and SUPERIOR
PLASTICS, INC.,
Debtors.

Bankruptcy Nos.
84-473 & 84-474

Motion No. 89-2188M

ORDER OF COURT

AND NOW, this 1 day of September 1989,
IT IS HEREBY ORDERED that the Application
to Approve Counsel for the Debtor Nunc
Pro Tunc is DENIED.

IT IS FURTHER ORDERED that the
Application for Compensation of the Debtor's
Counsel is DENIED.

At Pittsburgh, Pennsylvania.

/S/ JOSEPH L. COSETTI
BANKRUPTCY JUDGE

cc: Robert O Lampl, Esq.
Joseph J. Bernstein, Esq.
David K. Rudov, Esq.

APPENDIX C**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 90-3117

IN RE: FOUR D MANUFACTURING COMPANY
and SUPERIOR PLASTICS, INC.,
Debtors

Robert O. Lampl,

Appellant

Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 89-02258)
District Judge: Barron P. McCune

Submitted Under Third Circuit Rule 12(6)
August 16, 1990
Before: MANSMANN, GREENSBERG and SEITZ,
Circuit Judges.

JUDGMENT ORDER

After consideration of all
contentions raised by appellant, it is
ADJUDGED AND ORDERED that the
judgment of the district court be and is
hereby affirmed.

Costs taxes against appellant.

BY THE COURT,

/S/ Carol Los Mansmann
Circuit Judge

Attest:

/S/ SALLY MRVOS
Clerk

August 22, 1990

APPENDIX D

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
2. By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub. L. 100-352, §2(a), (b), 102 STAT. 662.)

APPENDIX E**11 USCS §327. Employment of professional persons**

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
- (b) If the trustee is authorized to operate the business of the debtor under §721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the

trustee may retain or replace such professional persons if necessary in the operation of such business.

- (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
- (d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
- (e) The trustee, with the court's approval, may employ, for a specified special

purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

- (f) The trustee may not employ a person that has served as an examiner in the case. (As amended October 27, 1986, P.L. 99-554, Title II, Subtitles A, B, §§210, 257(e), 100 STAT. 3099, 3114.)

APPENDIX F**Rule 2014. Employment of Professional Persons****(a) Application for and order of employment.**

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professional persons pursuant to §327 or §1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for his selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors or any other party in interest, their respective attorneys and accountants.

(b) Services rendered by member or associate of firm of attorneys or accountants.

If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the Court.